



# Red Flags

For Legal or Discrimination Issues on Job Orders



Job orders must be in compliance with all applicable state or federal employment laws. This includes labor standards, minimum wage, child labor, discrimination and disability related laws. In addition, Division of Workforce Solutions (DWS) policy requires job orders to represent actual, available, *employment* opportunities. The following tips or **Red Flags** can help you identify possible problems that may violate these standards.

Sometimes these problems are not obvious. They often appear to be legitimate requests from the employer. Frequently these problems are masked by a *lack of information* in the job order. Job order staff should be aware of potential problem areas and question the employer to ensure clear, complete, accurate, and *legal* job orders.

Asking questions and assisting employers to create better job advertisements is a *value-added* service. This assures that all qualified candidates have the opportunity to apply. It provides the employer with the best available choice of candidates. Other Internet job boards, newspapers, and staffing agencies do not provide this service. You can make your Job Center the recruiting agency of choice by providing this quality service.

## Discrimination

Under the Wisconsin Fair Employment Law, it is unlawful to discriminate against employees and job applicants based on the following:

- Age (40 and over)
- Marital Status
- Ancestry
- Military Service Membership (Reserves or National Guard)
- Arrest/Conviction Record
- National Origin
- Color
- Pregnancy or Childbirth
- Creed (Religion)
- Race
- Disability
- Sex
- Genetic Testing
- Sexual Orientation
- Honesty Testing (lie detectors)
- Use of Lawful Products (primarily smoking)

Any statements regarding these protections should be considered a **Red Flag**. There are situations where exceptions can occur (called a bona fide job requirement) but they should happen infrequently. If in doubt, seek technical assistance before completing the job order.

A statement or requested qualification in a job order may appear to be legal but have the *effect* of discouraging some job seekers from applying. When individuals who are covered by anti-discrimination laws (called protected classes) are adversely impacted, and the *result* is fewer members of the protected class getting hired, then the statement is discriminatory (called having a disparate impact). This is a form of illegal discrimination.

To avoid possible problems with discrimination, all requirements listed on a job order should relate to the duties of the job. A good rule to help avoid any potentially discriminatory wording is to describe the *duties of the job* and not the attributes or characteristics of the job seeker.

### **Rule of Thumb: “Describe the job and not the person”**

Common examples are requiring a driver’s license, a vehicle, language ability, high school diploma, or other educational level that does not relate to the actual duties of the job. Why does a laborer need a high school diploma? Why does a receptionist need a driver’s license?

Employers often ask for these qualifications as a test of the applicant’s reliability. However, having a car, a driver’s license, or a high school diploma is not necessarily a valid assessment of other employment factors such as reliability, responsibility, punctuality, math or reading skills, or the person’s ability to get to the work site. These requirements should not be included in a job order *just because* the employer requests them or believes they will get a better candidate. There should be a reasonably job-related rationale to ask for a qualification. Staff should work with employers to improve the wording of job orders and to minimize arbitrary or unnecessary qualifications.

Any of the following should be considered a **Red Flag** unless it clearly relates to the duties of the job.

- **Drivers License**

Asking for a driver’s license when the duties of the job don’t involve driving can be discriminatory. Getting to work is not a job-related requirement. People can get to the work site using a variety of methods. Arbitrarily excluding applicants without a driver’s license may have an adverse impact on persons with disabilities and/or some persons of color who statistically have lower incomes.

- **Car**

Requiring applicants to have a vehicle available, unless the job requires use of the vehicle on-the-job, can be discriminatory. Ownership of a car is not a valid test for the candidate’s reliability or ability to get to the work site. Arbitrarily requiring a vehicle may have a disparate impact on persons with disabilities and/or some persons of color who statistically have lower incomes and who may therefore use other means of transportation.

Not paying expenses for on-the-job use of a private vehicle can be an additional red flag for an independent contractor situation. Usually employers reimburse employees for business related expenses. Listing an independent contractor situation would be a DWS policy violation.

- **Educational Level**

Asking for an educational level that does not match the duties of the job may be discriminatory. A high school diploma is not a good measure of a person's ability to perform any task. It is not a valid indicator of a person's reliability or other personal attributes. Arbitrarily requiring a level of education may have a disparate impact on some persons of color who statistically are less likely to have a high school diploma.

It is appropriate to ask for occupational licenses and certifications. When educational achievement is required to get a certification or license, it is appropriate to ask for that qualification. Nurses, truck drivers, master plumbers, journey carpenters, day care teachers and insurance sales persons are examples. Educational achievement is required to perform the duties of some occupations. Teachers, engineers, accountants and medical technicians are examples. Asking for specific degrees in these situations is appropriate.

- **Language Ability**

Requiring the ability to read, write or speak English, unless it substantially relates to the duties of the job, can be discriminatory. The need for general communication in the workplace such as reading safety instructions, work rules, labels or company policies, may not justify requiring English proficiency when translation or other alternatives are reasonably available. The language skill level being sought should not exceed that needed to perform the job.

- **Physical Requirements**

Statements about the candidate's specific physical abilities may indicate disability-related discrimination. All candidates, who are otherwise qualified, and who can perform the essential functions of the job *with or without* reasonable accommodation, should be encouraged to apply. Statements about lifting requirements may have a disparate impact on women or persons with disabilities. Describe the job and not the person.

Wording of job orders should avoid descriptions of the candidate's personal characteristics. Language that *implies or expresses a preference* for characteristics not related to the ability to perform the job may be discriminatory. Descriptions of the person may imply the exclusion of candidates by gender, age, ethnic group or creed. Describe the job and not the person.

Any of the following should be considered a **Red Flag**.

- **Personality**

Requests for "young," "energetic," "active," "sports minded," "competitive," "aggressive," "fashion conscious," or "family oriented," or similar personality traits may imply an illegal preference for age or gender.

- **Appearance**

Weight and height requirements should be avoided unless they are essential to the performance of the job.

If in doubt, seek technical assistance before completing the job order.

## Other Legal Issues

Wisconsin employment laws have several other provisions staff need to keep in mind when writing job orders. Certain requests from the employer, or missing information in the job order, may be a **Red Flag**.

- **Smoking and Alcohol**

Wisconsin law prohibits discrimination in employment based on use, or non-use, of “lawful products” off the work site and during non-working hours. The employer can control use in the workplace and during work hours. Job orders cannot specify that the individual be a non-smoker or non-drinker (describing the person). It can state that the workplace is drug, alcohol, or smoke free (describing the job and working conditions).

- **Child Labor Laws**

Wisconsin law specifies a number of very specific requirements for employment of minors. These include hours of work that vary depending on the child’s age, days of the week and the school year. There are also prohibited tasks and occupations, depending on age. These regulations can be confusing to staff and employers. As a precaution, job orders for occupations or companies that typically involve employment of minors should be considered a **Red Flag** and reviewed more carefully. Although the employer is responsible for compliance with all employment laws, our job orders should be clear and complete so the employer gets applicants that are legally able to perform the job.

For example, an employer is requesting bus persons for a midnight shift at a restaurant. The job order is placed in September. Since no minors may work during a school week past 12:30 a.m., this job order should have 18 years old as a minimum age requirement.

If in doubt, seek technical assistance before completing the job order.

- **Minimum Wages**

Methods of compensation that are unusual, unclear, involve piecework, include room and board, or are commission based should be considered a **Red Flag**. These methods of compensation are legal but they may be confusing and may hide minimum wage problems. Staff should be careful to fully describe the situation and the method of compensation. If in doubt, seek technical assistance before completing the job order.

Unusual or unclear methods of compensation may be an indicator of independent contractor situations.

## Policy Issues

The DWS Job Order Policies and Procedures have several requirements that relate to legal issues and job orders. By federal regulation, a job order must represent employment rather than an independent contractor situation (self-employment). The following may be a **Red Flag** for job order policy issues.

- **Unusual Expenses**

Requiring the applicant or new employee to pay their own expenses for travel, use of a personal vehicle on-the-job, sales kits, or tools normally provided by an employer may indicate an independent contractor situation.

- **Fees to Apply**  
No fee may be charged to the applicant for any part of the application process. This includes pre-employment testing.
- **Piecework or Commission Compensation**  
These methods of compensation should be a **Red Flag**. Especially when associated with typical problem occupations, these can indicate independent contractor or minimum wage problems. Piecework in a construction job is an example. Straight commission in a sales job, especially when combined with no benefits or no reimbursement of expenses, is another.
- **Work at Home Situations**  
“Opportunities” to work at home should be considered an immediate **Red Flag**. These situations are usually independent contractor situations, or employment being inaccurately labeled as independent to avoid employment taxes. These situations rarely pay minimum wage for the hours worked. They are frequently scams.
- **Typical Problem Occupations**  
Some occupations are more likely to use independent contractors or to incorrectly classify employees as independent. These include logging, commission sales, construction work, computer technicians, home based sales (Tupperware, Mary Kay, Amway), real estate brokers, and truck drivers who are owner operators. Staff should question the “employer” to ensure the request is for an employee and *not* for an independent contractor. Independent contractor situations are legal if properly classified, but they are not allowed in JobNet. If in doubt, seek technical assistance before completing the job order.

### Technical Assistance

If you need help use the following resources in this order:

- Job Order Policies and Procedures and self-help guides on the Job Order Quality Assurance website
- Consulting the Equal Rights website and/or their labor law pamphlets
- Asking your supervisor or lead worker for assistance
- Contacting your Job Center Complaint Coordinator
- Contacting the DWS Job Order Quality Assurance Team
- Contacting a Bureau Director the Equal Rights Division directly, or referring the employer to a Bureau Director in the Equal Rights Division.